United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1856

To Be Argued By
HENRY ROOT STERN, JR.

B

P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ERWINE LAVERNE AND ESTELLE LAVERNE

Plaintiffs-Appellants,

-against-

HOWARD J. CORNING, JR., Mayor, HUTCHINSON DUBOSQUE, Deputy Mayor, Police Commissioner and a Trustee, ORIN LEACH, JOHN MACKAY and DOUGLAS DESPARD, Trustees, HUGH JOHNSON, Building Inspector, and EDWARD J. MEEHAN, Police Sergeant, jointly and severally, and individually and as respective officers as stated in the Incorporated Village of Laurel Hollow,

Defendants-Appellees.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

PRELIMINARY STATEMENT

This is an appeal from an order by the District Court, Southern District of New York (Knapp, U.S.D.J.), dismissing plaintiffs-appellants Erwine and Estelle Lavernes' (hereinafter "appellants" or the "Lavernes") civil rights damage complaint filed under 42 U.S.C. § 1983, after a jury

unanimously found that each and every appellee acted with the good faith and reasonable belief that they were carrying out the obligations of their respective offices and acting pursuant to lawful authority when they conducted inspections of appellants premises.

ISSUE PRESENTED FOR REVIEW

Did the District Court err in holding that local officials, who have allegedly violated a citizen's Fourth Amendment rights to be free from an illegal search, nevertheless have a defense to a damage suit under 42 U.S.C. § 1983 when the jury finds that they acted with the good faith, reasonable belief that the search was legal under existing law?

STATEMENT OF FACTS

Background

This action stems from entries onto certain real property located in the Village of Laurel Hollow made during the latter part of 1962. The property, formerly belonging to the Tiffany Estate, was purchased by appellant, Estelle Laverne, in 1949.

The Tiffany Estate is located in a residential area in the Village of Laurel Hollow. Pursuant to a building zone ordinance originally enacted in December, 1947, these premises were zoned exclusively for residential purposes and could not lawfully be used for commercial endeavors.

In June, 1950, the Village of Laurel Hollow brought an action against the Lavernes in Supreme Court, Nassau County to enjoin them from using the premises as a factory to manufacture and process wallpaper and related products in violation of the zoning ordinance of the Village. After a full trial on the merits, the Lavernes were permanently enjoined from conducting such activities (A. 139-153).* The Lavernes appealed, and the judgment was affirmed and the injunction made more stringent by the Appellate Division, 283 App.Div. 795, 128 N.Y.S.2d 326, and by the Court of Appeals, 307 N.Y. 784 (1954) (A. 139-153).

Thereafter, and in deliberate defiance of the judgment of the New York Courts and of the Village ordinance, the Lavernes continued to use their premises for the prohibited purposes (T. 358-359).

Prior to July, 1962, defendant-appellee Hugh Johnson, Building Inspector of Laurel Hollow, received complaints about possible violations of the zoning ordinances from one John Martin, a neighbor adjacent to the Laverne property (T. 27-28; 83-84). As a result of this, Mr. Johnson, pursuant to an ordinance of the Village of Laurel Hollow which directed the building inspector to

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* Cites commencing with "A" followed by a page number refer to the joint appendix. "T" refers to the trial transcript.

enter upon and inspect premises within the Village, made an inspection of the Laverne premises on July 24, 1962. Prior to the aforesaid inspection, Mr. Johnson had, on several occasions, visited the Lavernes' locked premises, but no one responded to his knock and he did not enter the building (T. at 44).

The Village ordinance directing and empowering the Building Inspector to make inspections read as follows:

> It shall be the duty of the Building Inspector, and he hereby is given authority, to enforce the provisions of this ordinance. The Building Inspector in the discharge of his duties shall have authority to enter any building or premises at any reasonable hour. (Art. X, § 10.1) (A. at 137.)

On July 24, 1962, while driving past the Laverne premises, Johnson noticed the front gate was open permitting access into the courtyard (T. at 28). After hollering out, he finally came upon 3 men who were outside in the back unclogging a water drain after heavy rains (T. 30-32). After engaging in friendly conversation about the drain problem, one of the 3 men, Rudy Gorlitz, who turned out to be the foreman of the wallpaper factory, began to show Johnson around the premises (T. 40-43). In the course of this, Johnson viewed drying racks, paints, thinners, silk screens, rolls of paper and other material (T. 33-35). Apparently Mr. Gorlitz believed Johnson was a real estate

agent, since the house was for sale at the time (T. at 53, 441). Mr. Johnson did not know that Mr. Gorlitz had mistaken him for a real estate agent and had assumed that he was being shown the premises because he was the building inspector. Mr. Gorlitz finally asked Mr. Johnson whether he was the real estate agent and was told that he was not (T. at 53). Mr. Gorlitz then asked Mr. Johnson to leave which he promptly did (T. at 74).

Subsequent to the July 24th inspection, Mr. Johnson reported to the Board of Trustees of the Village of Laurel Hollow, resulting in their decision that a further inspection be made by the Building Inspector and Deputy Mayor to obtain confirmation of whether or not the Lavernes were in fact violating the village ordinance and Court order. In this connection, the Honorable Thomas C. Platt, at that time the Village Attorney, was present and he advised that an inspection under the ordinance was proper (T. at 129). The Mayor, after consulting with the Village Attorney, agreed to accompany the Building Inspector and Deputy Mayor since it was his responsibility as mayor to enforce

all Village ordinances (T. 129-30).*

On October 18, 1962, these representatives of the Village of Laurel Hollow arrived at the Laverne premises to discover that the front gate was locked. They thereupon hailed the house in loud voices, but obtained no response (T. 55-56). Whereupon, Mr. Johnson picked up a long branch, approached the building and tapped an upper floor window. Rudolph Gorlitz came to the front gate and was advised by Mr. Johnson that he was the Building Inspector of Laurel Hollow and that he desired to inspect the premises (T. at 56). A police sergeant (appellee Edward J. Meehan) accompanied them to the gate in order to identify them as town officials, but never went on the premises (T. 130-134).

Following the introductions, Gorlitz admitted Mr. Johnson, Mr. Corning and Mr. Dubosque into the main entry of the premises and excused himself so that he could make a phone call, presumably to one of the Lavernes (Tr. 57-58).

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* McKinney's Village Law § 80, then in effect, covering the duties of a Village Mayor, provided in pertinent part that:

> It is the duty of the mayor to see that the provisions of this chapter and the resolutions and ordinances of the board of trustees are enforced; to cause all offenses created thereby to be prosecuted; to institute, at the direction of the board of trustees, all civil actions in the corporate name of the village; to exercise supervision over the conduct of the police and other subordinate officers of the village and to recommend to the board of trustees such measures as he may think necessary.

From where they stood in the main entry, Messrs. Johnson, Corning and Dubosque observed a large room containing drying racks, silk screen and paint (T. 136-137). The appellee officials did not enter any room of the premises other than the room to which they were invited by Gorlitz, and upon being asked to leave by a woman on the telephone (apparently Mrs. Laverne), they immediately complied with her wishes (T. at 59).

When leaving the premises, Messrs. Johnson, Corning and Dubosque observed vats, rags, papers, large tins of kerosene, thinners, paint cans and rolls of paper in the courtyard and garage area, which materials Johnson had previously been observed on the occasion of his July 24th visit (T. 136-137).

On the basis of the foregoing, the Village instituted a civil proceeding to hold the Lavernes in civil contempt of court for violating the 1954 permanent injunction (T. 158-159). Judge Suozzi of the New York State Supreme Court found that the Lavernes were indeed violating the permanent injunction and held them to be in civil contempt.

On December 16, 1962, following Judge Suozzi's first opinion, the Building Inspector received a telephone call from the Village Attorney and was told to make another inspection (T. 62-63). On December 17, 1962 he again visited

the Laverne premises and once more found evidence that appellants were continuing to manufacture wallpaper in continued willful violation of the permanent injunction (T. at 62-63). A second contempt citation was thereafter issued by Judge Suozzi.

The New York Court of Appeals Decision in People v. Laverne

Subsequent to the first civil contempt proceeding, the Village proceeded against appellant Erwine Laverne in an action for criminal violation of its zoning ordinance.

A year and one half later, on June 10, 1964, the New York Court of Appeals, in a 4-3 decision, reversed Mr. Laverne's conviction on the criminal informations on the ground that the Village Ordinance authorizing the three inspections was unconstitutional and, therefore, the fruits of those inspections could not lawfully be used against Mr. Laverne. People v. Laverne, 14 N.Y.2d 304 (1964) (A. at 118). That decision was the first time a court anywhere had held an ordinance of this type was unconstitutional and only three of the seven judges agreed that a warrant was needed.* In attempting to resolve these intricate Fourth

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* Chief Judge Desmond, concurring, voted for reversal solely on the ground that there was no probable cause for the entry and search. 14 N.Y.2d at 310. Judge Knapp correctly characterized People v. Laverne as a "landmark decision." (A. at 113.) The decision was commented on in a number of law reviews. See, e.g., 33 Fordham L.Rev. 456 (1964); 1965 Duke L.J. 158; 15 Buffalo L.Rev. 456 (1965); 49 Minn. L. Rev. 319 (1964).

Amendment principles, the New York Court of Appeals majority cited no supporting authority and had to distinguish Frank v. Maryland, 359 U.S. 360 (1959) and Ohio ex rel. Eaton v. Price, 364 U.S. 263 (1960). Judge Knapp, summarizing appellees' expert testimony,* correctly observed that only a clairvoyant could have realized that the three 1962 inspections would some future day be declared to have violated the appellants' rights under the Fourth Amendment (A. at 144).

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* Prior to the trial, the parties had stipulated to the use of experts on both sides to show their respective contentions as to the state of the search and seizure law in 1962 because this was relevant to the issue of whether appellees had reason to believe in the validity of the three searches. At trial, appellants chose not to produce an expert. Appellees produced Professor Norman Dorsen of the N.Y.U. Law School. Professor Dorsen had argued See v. City of Seattle, 387 U.S. 541 (1967) which was a campanion case to Camara v. Municipal Court, 387 U.S. 523 (1967), the case that expressly overruled Frank v. Maryland, supra.

Proceedings Below

Despite the fact that it was a landmark decision by the New York Court of Appeals that held the Lavernes' rights had been violated, and even though neither of the Lavernes was present at any of the three inspections, the Lavernes chose to sue the various Village officials who they believed had played any part in the inspections. They sued the mayor, Howard Corning, Jr., the deputy mayor and police commissioner, Hutchinson Dubosque, Trustees Orin Leach, John MacKay and Douglas Despard, the building inspector, Hugh Johnson and the police sergeant, Edward J. Meehan. Nor were the Lavernes thwarted by the fact that numerous courts had found that they were in violation of the law by conducting their wallpaper factory in a residential area. Indeed, at the trial of this case, although both Lavernes denied they were running a business, their own witness, Mr. Gorlitz, admitted that he and the two other employees were manufacturing wallpaper (T. 358-359).

Nevertheless, in June 1970, Judge Tenney granted summary judgment on the question of liability, holding the New York Court of Appeals decision in People v. Laverne, supra, precluded any finding other than the appellants' rights had been violated and that the question of fact as to whether the appellee Village officials had acted in

good faith would not have to be resolved at trial because good faith was not a defense (A. at 35). The following year this Court decided in Bivens v. Six Unknown Federal Narcotics Agents, 456 F.2d 1339 (2d Cir. 1972), that federal agents could assert their good faith as a complete defense to an action based on a claimed violation of plaintiff's Fourth Amendment rights. On the basis of that decision, appellees moved before Judge Tenney to vacate his order granting summary judgment on liability. Judge Tenney denied the motion but indicated it would be wiser to let the trial judge resolve the question, suggesting the question of good faith be tried and a special verdict employed (A. at 54). Judge Knapp, the trial judge, adopted this suggestion and the case went to trial on the issue of the good faith of appellees.

The trial below began on March 4, 1974 and lasted a full week. Judge Knapp gave opening instructions to the jury that they had to assume that appellees violated the Lavernes' Fourth Amendment rights and that the sole issue in the case was whether or not the searches were conducted in good faith (T. at 3-5). Consequently, the judge ordered that defendants-appellees put their case on first, since it was their burden to establish their good faith. At the conclusion of the case, Judge Knapp instructed the jury in

accordance with the standards set forth by this Court in Bivens, supra (A. 56-104). The jury returned a unanimous verdict that appellees had acted in good faith (A. 99-106). Thereafter, Judge Knapp wrote a long opinion analyzing the good faith defense, and holding that the jury's verdict mandated a dismissal of the case (A. at 111). With regard to the underlying facts, Judge Knapp summarized the testimony as follows:

> All defendants testified without material contradiction that - in substance - the discovery of the apparent violation of the 1954 injunction was the result of Mr. Johnson's poking around the property with the misinformed consent of the Lavernes' employee; and that once the violation was discovered, defendants believed they were authorized and indeed obliged to confirm its existence and have it corrected. The testimony also established beyond doubt that defendants' inspections had never intruded on any residential portions of the Laverne property but had been restricted to areas where plaintiffs' corporation was believed to be carrying on its business activities. In addition, defendants called as an expert Professor Norman Dorsen of the N.Y.U. Law School, who essentially testified that in 1962 only a clairvoyant could have realized that the defendants' inspections would some day be declared to have violated the Fourth Amendment prohibition against unreasonable searches and seizures.
>
> Neither Mr. nor Mrs. Laverne was able to testify to a single fact that might have tended to rebut the defendants' claimed good faith. The Lavernes' testimony centered upon the question of whether their own activities on the property had in fact constituted a continuing violation of the injunction or - as plaintiffs hotly contended - had merely been their private activities as professional artists. It was plaintiffs' contention that

> the equipment seen by defendants was so plainly that which one would expect to find in any artist's studio, that defendants' inference of violation drawn from that equipment was a fortiori evidence of defendants' bad faith. We cannot, of course, know whether the jury rejected the factual underpinnings of this argument or merely declined to draw the inference urged by plaintiffs.
>
> In any event the jury found specially that each defendant had acted in good faith, as that phrase was defined in the court's charge. (A. at 114.)

SUMMARY OF ARGUMENT

The District Court correctly ruled that the Village officials herein were entitled to the defense that they were carrying out the obligations of their respective offices and were acting pursuant to lawful authority when they conducted the inspections. The officials relied in good faith on the validity of a long-standing Village ordinance, and were not required to predict the future course of constitutional law. The District Court's holding was mandated by this Circuit's decisions in Bivens v. Six Unknown Federal Narcotics Agents, 456 F.2d 1339 (2d Cir. 1972) and Tucker v. Maher, 497 F.2d 1309 (2d Cir. 1974). These cases are especially applicable here where "only a clairvoyant" could have predicted the subsequent invalidity of the Village ordinance relied upon.

Although appellants purport to raise a number of different arguments in support of their position, on

analysis they all reduce to the same one, that is, Judge Tenney was correct in originally ruling that good faith was not a defense to a civil rights suit based on a violation of one's Fourth Amendment rights. Appellants attempt to distinguish Bivens, supra, by arguing that Bivens involved an illegal search incident to a false arrest, while the instant case did not involve a false arrest. By its mere statement, such a distinction is clearly meritless. False arrest accompanied by a search of the person is clearly a "more serious intrusion" than a search of premises where the owners are not even present. If the officers in Bivens were allowed a good faith defense, a fortiori, the appellees were entitled to this defense.

ARGUMENT

POINT I

THE DISTRICT COURT CORRECTLY RULED THAT THE GOOD FAITH OF APPELLEES IS A DEFENSE AGAINST LIABILITY FOR A VIOLATION OF APPELLANTS' CIVIL RIGHTS

A. Officials May In Good Faith Rely on a Statute

In Bivens v. Six Unknown Federal Narcotics Agents, 456 F.2d 1339 (2d Cir. 1972), this Court made clear that "as a matter of constitutional law and as a matter of common sense," a public official may assert his good faith as a complete defense to a civil rights suit based upon a claimed violation of one's Fourth Amendment rights. 456 F.2d at 1348.

With strained interpretations of the common law, appellants are now asking this Court to defy common sense and to distinguish Bivens (and many other authorities) by ruling that an official should be absolutely liable for civil damages even where the official relies in good faith on a statute which is subsequently declared unconstitutional. The Lavernes still insist that good faith reliance on the validity of a statute is not a defense despite the fact that this Court only recently again recognized that "[i]t is well settled, however that a peace officer cannot be charged with the responsibility of predicting the future course of constitutional law." Tucker v. Maher, 497 F.2d 1309, 1313 (2d Cir. 1974), citing Pierson v. Ray, 386 U.S. 547, 555 (1967).

A case more illustrative of the just and common sense reason for permitting officials to rely in good faith on a statute in carrying out their duties than this case is difficult to imagine. This is not a case where appellants' constitutional rights were brutally violated. Neither appellant was even present during the three searches complained of; only their corporate employees, themselves engaged in illegal activities, were present. The Village officials, scrupulously avoided entering what they thought might be the private residential part of the estate, extending their

inspections only to the parts of the building which were obviously being used as part of the appellants' commercial activity. The searches were conducted in a quick, gentlemanly fashion (T. at 136). No force was used and the officials left the premises each time they were so requested (T. at 53,59, 65). The jury unanimously found that each appellee had conducted himself in good faith in carrying out his duties to ensure the village ordinances were enforced. The appellees are not attorneys but they consulted with the village attorney who did not advise them of the need for a warrant. They, in good faith, relied upon the village ordinance for authority to inspect the appellants' premises.

This case is actually even more compelling than Pierson, supra, or Tucker, supra, where the officials might have had reason to suspect the invalidity of the statute relied upon in carrying out their duties. Here, appellees had no way of predicting the invalidity of the ordinance allowing inspection at a reasonable time. People v. Laverne, supra, was truly a case of first impression. Indeed, of the nine state judges who had to decide this issue, only four found the ordinance unconstitutional. Prior to this case no New York court -- and for that matter, no court anywhere in the nation -- had declared such an ordinance invalid. In fact, a year after the New York

Court of Appeals handed down its landmark decision in People v. Laverne, a California District Court of Appeals affirmed a conviction and held a similar ordinance valid, Camara v. Municipal Court, 46 Cal.Rpts. 585 (1965). The Supreme Court in reversing this decision (Camara v. Municipal Court, 387 U.S. 523 [1967]), found it necessary to expressly overrule Frank v. Maryland, supra, decided only eight years previously. The Supreme Court's overruling one of its decisions after such a short period is obviously rare.

It would truly defy common sense and be grossly unfair to rule, even though a jury unanimously found each and every appellee had acted in good faith belief, reasonably arrived at, that he was carrying out the obligations of his respective office and was acting pursuant to lawful authority, that these town officials are nevertheless liable to appellants because they failed to predict the invalidity of the village ordinance by a 4-3 vote of the highest Court in the State. Surely, federal courts should not hold that appellees' lot as village officials was so unhappy that they had to choose between being charged with dereliction of duty if they failed to enforce the village's ordinances and being mulcted in damages if they did. See, Pierson v. Ray, supra, 386 U.S. at 555.

B. Judge Tenney's Order Incorrectly Applied New York Common Law

Appellants' entire position on this appeal is an attempt to restore the rationale and holding of Judge Tenney's decision granting summary judgment for appellants. Analysis of Judge Tenney's opinion, however, reveals its basic error.

The Supreme Court in Pierson v. Ray, 386 U.S. 547 (1967), held good faith is a defense available to officers sued under § 1983 for a violation of plaintiff's civil rights stemming from an arrest under a statute subsequently declared unconstitutional. In so doing the Supreme Court did not indicate an intention to limit the good faith defense to suits involving an arrest. Good faith reliance on the validity of a statute is a defense whether the official is sued under § 1983 for false arrest or for an illegal search. An official simply is not charged with predicting the future course of constitutional law regardless of what he is sued for after the statute turns out to be invalid.

Nevertheless, Judge Tenney ruled that good faith was not a defense in this case because appellants were not suing for false arrest or a search incident to such an arrest, but for an illegal search not involving an arrest. In so holding, Judge Tenney had to distinguish this Court's holding in Bivens.

Judge Tenney's opinion and appellants' argument rest on a single statement taken out of Monroe v. Pape. 365 U.S. 167, 187 (1961) (and quoted in Pierson v. Ray, supra, 386 U.S. at 556) that § 1983 "should be read against the background of tort liability" (Appellants' Brief at 28).

Appellants contend, as Judge Tenney held, that this lone statement compels a court in a § 1983 case to rigidly incorporate all, whether sound or unsound, common law tort principles, mating them to their analogous counterparts under the Civil Rights Act. Appellants argue that since an illegal search and seizure is analogous to the common law tort to trespass, the court should "plug in" the New York case law of trespass which they claim adheres to "strict liability" in trespass cases with no defense of good faith allowed.* By extension appellants then conclude there is no defense to a civil rights case based on an illegal search and seizure, without an illegal arrest.

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* Judge Knapp concluded to the contrary:

> "We are satisfied that the common law would have afforded these defendants the opportunity to establish that they inspected plaintiffs' property because they reasonably believed in good faith that such inspections were lawfully authorized by Article X, § 10.1 of the Village Ordinance." (A. at 115-116.)

Yet appellants concede, as they must, in light of Bivens and Pierson, that if the civil rights action is also for arrest, then the appellees have a valid defense of good faith. The conclusion is absurd. Stated otherwise, if the appellees had not merely entered upon the appellants' premises but had, in further disregard of appellants' constitutional rights, put them under illegal arrest, only then would appellees be permitted a defense of good faith. But where the appellees limited their conduct to searches of the premises, they do not have available the defense of good faith. Such an anomaly cannot possibly be read into the Supreme Court's decisions in Pierson v. Ray nor into the Second Circuit's in Bivens. Judge Knapp correctly rejected it. He noted that the warrantless arrest in Pierson "is obviously considered a more serious intrusion" than the illegal attachment in Tucker v. Maher or the illegal trespass alleged in this suit. He then held:

> "In short, we do not read the cases to mean that a police officer who deprives a person of his liberty by arresting him or her can if later sued under §1983 avail himself of the defense that he had a good faith, reasonable belief in the lawfulness of the arrest, but that a fellow officer who simply trespasses upon a person's property cannot be heard to claim that he acted with the good faith belief that his entry was lawfully authorized by statute or ordinance." (A. at 117).

Quite obviously, appellants' error is in taking the terse statement in Monroe v. Pape that §1983 "be read

against the background of tort liability", and by that alone, attributing to the Supreme Court the intent to import wholesale into federal civil rights jurisprudence all the anomalies and historical aberrations contained in common law tort doctrines. The present case very clearly points up the fallacy of such a rigid approach.

The reason why the Lavernes can say that the common law of trespass (to which an illegal search and seizure is arguably analogous) does not allow for the defense of good faith is because the common law tort of trespass, developed largely by historical accident, is irrationally one of strict liability (a "technical tort"). Professor Prosser analyzed it thus:

> "The law pertaining to trespass upon land has been described as 'both exceptionally simple and exceptionally rigorous.' In the eyes of the common law, every unauthorized entry upon the soil of another was a trespass, 'for the law bounds every man's property and is his fense.' The strict and severe rules of the action of trespass, to which reference has previously been made, have survived to a considerable extent until quite modern times, and the courts have been slow to modify them as in the case of injuries to the person. Some of them are only now passing out of the picture. This survival, which sometimes has resulted in distinctions between person and property that can only be described as highly artificial and unreasonable, probably was due primarily to the fact that upon the action of trespass was placed the burden of vindicating property rights, and claims to possession and ownership. Since in the usual case the important question was the disputed title, and any technical invasion would serve as the basis of litigation to settle it, the rules as to the character of the tort itself tended to become fixed, and to remain so." W. Prosser, Law of Torts at 63 (3d ed. 1964), (footnotes omitted).

Professor Prosser then makes the following observation:

> "There is no great triumph of reason in a rule which makes a street railway, whose cae jumps the track, liable only for negligence to a pedestrian on the sidewalk, but absolutely liable to the owner of the plate glass window behind him. The strict rule appears to have been repudiated in England, where it was born, and it is safe to say that it is almost at its last gasp in the United States . . . . The rule still survives in New York, which may be the only state; but the latest decision there narrowly limits it to cases in which the defendant has done some affirmative volitional act which immediately causes the invasion of the land; and this may foreshadow ultimate abandonment." Id. at 64 (footnotes omitted).

Indeed, for his statement that the "rule still survives in New York, which may be the only state," Professor Prosser cites one of the very cases relied upon by appellants. (Socony-Vacuum Oil Co., Inc. v. Bailey, 202 Misc. 364 (Sup. Ct. 1952) cited in Appellant's Brief at 33).

It is inconceivable that the Supreme Court, in formulating modern guidelines for the prosecution of civil rights actions, would intend, by virtue of that one phrase in Monroe v. Pape, to perpetuate an archaic rule which is "highly artificial and unreasonable" and which is "no great triumph of reason." Nor could that court have meant to create such an absurdity, as illustrated here, where appellees could have asserted good faith as a defense if they

had, in addition to their search, arrested the Lavernes, but cannot assert such a defense because they merely conducted a search.*

Clearly, what the Supreme Court intended in Monroe v. Pape and Pierson v. Ray, supra, was that the federal courts, having the responsibility of developing a sound and wise body of federal law under the private civil rights acts, should look for guidelines to the sound principles and doctrine developed in common law tort jurisprudence by generations of judges, lawyers and scholars. Doubtless, the Supreme Court did not mean that federal courts must limit their ingenuity to the common law tort principles of the state where the federal court is located. The Supreme Court simply did not intend, by its statement in Monroe v. Pape, to stifle federal law by insisting on the application of archaic common law doctrines. Rather as Justice Brennan has noted:

> "Standards governing the granting of relief under §1983 are to be developed by the federal courts in accordance with the purposes of the statute and as a matter of federal common law." Adickes v. Kress & Co., 398 U.S. 144, 231 (1970) (concurring opinion)(emphasis added).

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* An additional absurdity under Judge Tenney's rationale is that by "plugging in" local law, there would be created 50 differing bodies of federal law under § 1983, and only if the suit were brought in New York would good faith not be a defense to an illegal search (according to Professor Prosser's commentary).

As a matter of federal common law, this Court in Bivens and Tucker, supra, has already held that the federal policies underlying the civil rights acts will best be carried out by permitting the defense of good faith, and this rule, as Judge Knapp held, applies fully here.

POINT II

APPELLANTS' REMAINING POINTS ARE WITHOUT MERIT AND DO NOT WARRANT REVERSAL OF THE DISTRICT COURT ORDER

The remainder of appellants' arguments are either repetitious or patently without merit.

Appellants contend in Point II of their brief that the 1964 New York Court of Appeals decision in People v. Laverne, supra, should have collaterally estopped appellees from establishing their good faith herein. Clearly, however, People v. Laverne does not operate as collateral estoppel on the issue of good faith since good faith was never litigated in that case. People v. Laverne, a criminal prosecution against Mr. Laverne, simply held that Mr. Laverne's Fourth Amendment rights were violated and applied the exclusionary rule to reverse his conviction.

In Point III, appellants argue that there was insufficient evidence below for the jury to find appellees in good faith. Again, this argument is repetitious, for

it is based on a theory that the New York Court of Appeals decision in People v. Laverne somehow precludes appellees from urging their good faith in this case. Once again, appellants attempt to blur the distinction between the violation of one's Fourth Amendment rights in the context of a criminal case and a damage suit for such a violation under § 1983. As the decisions of this Court in Bivens and Tucker, supra, make clear, an official may assert his good faith in a § 1983 case even if a State or Federal criminal proceeding has already found that the official deprived the plaintiff of one of his constitutional rights.*

Appellants' claim, in Point IV of their brief, that the mayor and deputy mayor had no basis to believe in the validity of the October 18, 1962 search, is equally without merit. Once again, the issue is whether the good faith belief was reasonable not whether they in fact had authority as appellants incorrectly argue (Appellants' Brief at 57). The fact that they were acting cooperatively with the building inspector gave them reason to believe the search was valid, as Professor Dorsen pointed out (T. at 309-310). Additionally, the village attorney who was

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* Judge Lumbard observed in Bivens that normally a § 1983 case will follow a determination in a State criminal proceeding that the plaintiff was deprived of a constitutional right. 456 F.2d at 1348.

consulted, never advised of the need for a warrant and the mayor was aware of his duties to enforce all the Village ordinances as required by the Village Law § 80 (McKinney's) (T. at 128-29). The jury was properly instructed to determine whether an ordinary reasonable person in the same position as the mayor and the deputy mayor at that time, operating under the same circumstances, would have believed the inspections were made with authority and pursuant to valid law (A. at 68). The jury specifically found that both the mayor and deputy mayor had a reasonable basis to believe the search was valid (A at 106; Question 1 answered unanimously in the affirmative, A at 99).

In Point V of their brief, appellants contend that Judge Knapp's refusal to instruct the jury (after it submitted a question during deliberations) concerning the pertinency of the architect's accompanying the building inspector on July 24 is reversible error.* However, trial counsel's suggested additional charge was not responsive to the jury's questions, as Judge Knapp noted (A. at 98) and therefore not required. Moreover, Judge Knapp specifically asked the jury whether he had answered their question and the forelady told the Judge he had (A. at 97).

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* Judge Knapp had instructed the jury on the pertinency of the inviting of the architect in his instructions before deliberations commenced and no objection was made to this instruction. (A. at 70-71).

Finally, appellants claim in Point VI that they should have been allowed to put into evidence what their other wallpaper factory outside the village looked like. Judge Knapp correctly denied this request, for all this evidence might have proven is what a large wallpaper factory looks like, not that appellants did not have a smaller factory in the village. Despite appellants' denials, their own employee (T. at 358-63) and the photographs (A. at 154-58) clearly prove appellants were operating a factory in their claimed residence. The village officials were not in bad faith in believing the Lavernes were violating the village's zoning ordinance by operating a wallpaper factory on their premises and the jury agreed.

Thus, this Court is left with the only real issue in the case: Does the jury's unanimous verdict for all appellees bring them as a matter of law within the protection afforded by the Bivens and Tucker cases discussed in Point I hereof? We submit that the jury's verdict does.

CONCLUSION

For the foregoing reasons the order of the United States District Court for the Southern District of New York dismissing the Complaint herein, should be affirmed in all respects.

Respectfully submitted,

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Rec'd
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